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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re A.A., a Person Coming Under the
Juvenile Court Law.

2d Juv. No. B221262
(Super. Ct. No. JV40441)
(San Luis Obispo County)

SAN LUIS OBISPO COUNTY
DEPARTMENT OF SOCIAL SERVICES,

Plaintiff and Respondent,

v.

ANTHONY A.,

Defendant and Appellant.

Anthony A. (father) appeals from the orders of the juvenile court denying a modification petition and terminating parental rights to his daughter, A.A. (Welf. & Inst. Code, §§ 388, 366.26, subd. (c)(1).)¹ Father contends the juvenile court abused its discretion in denying his modification petition, and by ruling that the parental benefit exception to adoption did not apply. The parental rights of the minor's mother were terminated in the dependency proceedings. She is not a party to the appeal. We affirm.

¹ All statutory references are to the Welfare and Institutions Code unless stated otherwise.

FACTS

Despite a restraining order protecting mother from father, they were living together in father's apartment, along with their five-year-old daughter, A.A. On December 3, 2008, father followed mother into the bathroom and broke a window. Father grabbed mother's apartment keys, and left the apartment with A.A. Police officers arrested father and returned A.A. to mother. Several days later A.A. was removed from the home and placed in protective custody. She has been living with her maternal grandparents since that time. The grandparents are also the legal guardians of A.A.'s two daughters from a previous relationship.²

Father was arrested and ultimately granted three year's probation with the condition that he serve one year in county jail. His criminal history dated back to 1998, when he was convicted of second degree robbery and served three years in state prison. (Pen. Code, §§ 211, 212.5.) In 2005, he was convicted of inflicting corporal injury on a spouse and placed on formal probation. After approximately five months in jail on his most recent offense, father was moved to the Honor Farm, where he served the remainder of his one-year incarceration.

Mother and father have a long history of domestic violence which includes physical fighting. The police department was called to the family's apartment on six occasions in 2008. Father had instructed A.A. to go to her aunt's house whenever he and mother fought. Mother and father repeatedly told her not to tell anyone about the violence. A.A. denied ever having seen them fight.

On one occasion in November 2008, father hit mother in the face while he was "drunk and out of control." After that incident, A.A. told the investigative social worker that she heard her parents arguing but did not see them fighting. She said, "Pretty

² In December 2002, mother lost custody of A.A.'s half-siblings. At that time, she was pregnant with A.A. Mother was reunified with her children in 2003, but they were removed again in 2004, due to mother's arrest for probation violations. Mother was incarcerated, and the half-siblings were placed with the maternal grandparents. Mother's parental rights have been terminated, and the grandparents are seeking adoption.

much they were drunk. They were drinking beer.'" A.A. indicated that she wanted to live with her grandmother and two sisters.

In a jurisdiction/disposition report prepared December 2008, the Department of Social Services (DSS) recommended that father not be offered family reunification services because he had been convicted of a violent felony. (§ 361.5, subd. (b)(12).) DSS noted that father has a lengthy history of violent behavior and abuses alcohol. A.A. is only five years old and has been exposed to a chaotic and frightening lifestyle. DSS concluded that the detriment to A.A. if services were not offered to father was outweighed by her exposure to physical violence and the resulting emotional trauma suffered while in his care.

Following a contested jurisdiction/disposition hearing, father submitted on the report of DSS. The court denied reunification services to father based upon his prior violent felony conviction and current incarceration. It authorized contact visits at the Honor Farm, and set the matter for a section 366.26 hearing for June 17, 2009. At the detention hearing, father had declined jail visits with A.A. Father later testified that he did not ask for visitation at the jail because he did not want A.A. to see him in that environment. He requested visitation after he was moved to the Honor Farm, but saw A.A. only once during that time.

The matter was continued on several occasions. On August 18, 2009, father filed a JV-180 Request to Change a Court Order. (§ 388.) He was scheduled to be released from jail in November. Father asked the court to set aside its previous order denying him reunification, and to grant him services. Father stated that he and A.A. "have always had a close and loving relationship and that it is in [A.A.'s] best interest to have [father] receive services. [Father] is expected to be released from jail soon and looks forward to reunifying with [A.A.]" He stated that their "beneficial bond" was demonstrated during visitation.

DSS issued a report for the section 366.26 hearing recommending the termination of parental rights and adoption by the grandparents as the permanent plan. The report indicated that A.A. was having difficulty in school, and there was concern that

she might not be able to advance to the first grade. She was seeing a therapist and enjoyed the sessions. Grandmother reported that A.A. had expressed a longing for her father, particularly because his birthday was approaching. A.A. speaks fondly of him, but "understands the situation." DSS stated that the grandparents have provided loving and consistent care to A.A. and her half-siblings.

Combined Section 388 and 366.26 Hearings

On October 26, 2009, the juvenile court held a combined modification petition and permanent plan hearing. (§§ 388, 366.26.) Father's counsel indicated that he would be released from jail on November 27. He requested permission to withdraw the previously filed modification petition and argue a new motion. He indicated DSS had recommended the bypass of services under section 361.5. At that time, father had submitted on the social worker's report based upon his attorney's determination that he would be sentenced to prison on the criminal matter. Instead, he was granted probation with one year in county jail. The court and parties agreed that father's counsel could proceed on an oral modification petition.

Testimony of Father

Father testified that he had been at the Honor Farm for seven months, the majority of his time on this conviction. He had participated in Alcoholics Anonymous at the Honor Farm and was in a job readiness program offered through Cuesta College. Upon his release, he planned to get his "HVAC" certification so he could work on heating and air conditioning units.

Father also testified that he wanted to take child development courses to become a better parent. He stated that A.A. had lived with him all her life, with the exception of two months when he and mother were separated. For one year, A.A. had lived exclusively with him, while mother attended a drug rehabilitation program. He later allowed mother to move into the apartment he and A.A. shared because mother had nowhere else to go. A.A. is accustomed to seeing him daily. Father has had one visit with A.A. since he has been incarcerated. She responded very well to him and it broke his heart to let her go.

During the most recent offense, father was inside the apartment. He walked into the bathroom and caught mother with a needle in her arm. He broke the window in anger, took A.A. and left the apartment. He was sober when he broke the window. He now realizes he could have handled the situation very differently. Prior to committing the instant offense, father had completed a one-year batterer's treatment program.

Father testified that, when he is released from jail, he plans to live with his aunt in Atascadero. She has an apartment that is large enough for A.A. to live with them. Mother is completely out of his life. He is willing to take anger management classes, attend parenting programs and submit to alcohol and drug testing. Father testified he has changed because he thinks before he does something, rather than just reacting. He acknowledged that he has an alcohol problem, and that the incidents of domestic violence have been caused by his excessive drinking. Father stated that he does not use drugs and last smoked marijuana as a teenager.

While in custody, father did not want A.A. to visit him in jail and see him "through the glass in that environment." He had one visit with A.A. at the Honor Farm. After her first visit, father asked his social worker to arrange another visit, but nothing occurred. On cross-examination, father testified that he did not contact his social worker to ask if she knew of any anger management programs he could attend. Father said he could not reach her by telephone. He wrote a letter to his attorney who did not respond, so he finally wrote to the judge.

Testimony of Social Worker

Father's social worker, Stacy Willis, was present for the visit at the Honor Farm. She testified that it was very emotional and very sad. Father and A.A. sat together and hugged and talked. A.A. told Willis that she wanted to live with her grandparents and sisters. She wanted to see her parents, but did not want to live with them.

Willis commended father's efforts at rehabilitation, but it was her opinion that he had not demonstrated enough time of sobriety and stability. A.A. had suffered significant emotional trauma by witnessing severe violence between her parents, to the point of physical injury to mother. Willis was very concerned about the family's "safety

plan," which required a five-year-old child to take the initiative to leave her home while her parents were drinking and fighting and to go to a relative's house. Willis questioned whether father could maintain his efforts at sobriety when released.

The juvenile court found that there had not been a significant change in circumstances that would warrant setting aside its previous order. The court noted with approval that father had attended six Alcoholics Anonymous meetings while at the Honor Farm. No batterer's treatment program was offered at the jail, but it was father's actions that had caused him to become incarcerated where such treatment was unavailable. Moreover, he had participated in batterer's treatment before the present offense, which was obviously unsuccessful in preventing reoccurrence of domestic violence.

The juvenile court denied the modification petition, finding that the proposed change in orders would not promote the best interests of the child. A.A. had been living with her grandparents in a stable environment for a full year, a significant portion of her life. It was not in A.A.'s best interests to require her to wait until her father addressed the issues that lead to her dependency.

Received into evidence was DSS's section 366.26 report. The court continued the matter until December 8, 2009, to allow for a permanency planning mediation, and noted that father would be out of custody at that time. When the court reconvened, DSS reported that a mediation had been conducted and the parties agreed that father would be permitted to visit A.A. The court indicated that it had considered all the documentary evidence and testimony, and concluded the parental benefit exception did not apply.

The court noted that father made the difficult choice of not having A.A. visit while he was in jail. As a result, he had no history of visitation during the past year. The juvenile court found clear and convincing evidence that A.A. was adoptable, terminated parental rights and ordered adoption as the permanent plan.

DISCUSSION

Father argues that the court abused its discretion by denying services because he showed sufficient changed circumstances and that reunification would be in

A.A.'s best interest. He also asserts that the juvenile court should have applied the parental benefit exception to adoption. (§ 366.26, subd. (c)(1)(B)(i).)

Section 388 Petition

Under section 388, a juvenile court is authorized to modify a prior order if a petitioning parent shows a change of circumstances or new evidence and establishes that modification is in the best interests of the child. (§ 388, subd. (c); *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Eric E.* (2006) 137 Cal.App.4th 252, 260.) The court has broad discretion in resolving a petition to modify a prior order. Its determination will not be disturbed on appeal unless an abuse of discretion is clearly shown. (*In re Stephanie M.*, *supra*, at p. 318.) "It is not enough for a parent to show just a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child. [Citation.]" (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.)

To support his request to change the court order, father asserted that he had raised his daughter until her removal at age five. He could not complete services due to his incarceration. Upon his release in November 2009 he intended to take parenting and anger management classes and continue to attend Alcoholics Anonymous. Father argues that A.A. could continue to live with her grandmother, while he visits her and receives reunification services. Father asserts that the juvenile court's refusal to grant services was an abuse of discretion, given his imminent release from jail, the barriers to visitation while incarcerated, and the minor's strong bond with him.

In determining the best interests of the child, the juvenile court shall consider the reason for the dependency, the reason the problem was not overcome, the strength of the parent-child and child-caretaker bonds, the length of time the child has been a dependent, the nature of the change of circumstance, the ease by which the change could be achieved, and the reason it was not made sooner. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446-447.) The court considered these factors and found that father had not shown that his request was in A.A.'s best interests.

Although father attended Alcoholics Anonymous meetings during his incarceration, he did nothing to address his violent history, a major factor which brought A.A. to the attention of DSS. He attended a 52-week batterer's treatment program in 2007, but less than a year later he was arrested and incarcerated for his violent conduct. The only circumstances that had changed were that father had attended Alcoholics Anonymous meetings and would soon be released from custody.

Father relies on *S.T. v. Superior Court* (2009) 177 Cal.App.4th 1009, to argue that the juvenile court should have provided him reunification services. Father cites amendments to the dependency statutes (Assem. Bill 2070, Stats. 2008, ch. 482, eff. Jan. 1, 2009) intended to improve the opportunities for incarcerated parents to reunify with their children. Under this legislation, the juvenile court may extend services, taking into consideration the special circumstances of an incarcerated parent, including barriers to access to services and ability to maintain contact with the minor. (§§ 361.5, subd. (a)(3), 366.21, subd. (e); *S.T. v. Superior Court*, *supra*, at p. 1017.)

S.T. is distinguishable. There, the minor was detained at birth and placed with her maternal grandparents. Both mother and father were incarcerated. Father had received services, but was unable to comply with the court orders that he participate in drug treatment, because the prison did not offer such a program. Father was due to be released from custody and, at the six-month review hearing, requested an additional six months of services. The juvenile court terminated reunification services, believing it did not have the discretion to continue them because father had not complied with court-ordered treatment. (*S.T. v. Superior Court*, *supra*, 177 Cal.App.4th at pp. 1014-1015.) The reviewing court reversed, directing the juvenile court to exercise its discretion to continue or terminate services, based upon the recent statutory amendments. (*Id.* at p. 1018.)

Father acknowledges that *S.T.* is not persuasive, but argues that it reflects a legislative trend towards providing access to services for incarcerated parents. *S.T.* does not advance father's position because he was never granted services. They were denied due to his prior violent felony conviction. The statutory amendments, and the policy

underlying them, are inapplicable to father's situation. The juvenile court did not abuse its discretion in denying his petition.

Parental Benefit Exception to Adoption

Father contends that the juvenile court lacked substantial evidence to support its finding that the parental benefit exception to adoption does not apply.

Section 366.26, subdivision (c)(1) requires the juvenile court to terminate parental rights if it finds by clear and convincing evidence that a child is likely to be adopted. However, a court may choose not to terminate rights if it finds, under an enumerated exception, "a compelling reason for determining that termination would be detrimental to the child" (*Id.*, subd. (c)(1)(B).) One such exception applies when there exists a beneficial parental relationship. This exception requires a showing of "regular visitation and contact with the child and [that] the child would benefit from continuing the relationship." (*Id.*, subd. (c)(1)(B)(i); *In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

"To meet the burden of proof, the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits. [Citation.]" (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.) There must be proof of a parental relationship, not merely a relationship that is "beneficial to some degree but does not meet the child's need for a parent." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) The existence of a beneficial relationship is determined by the age of the child, the portion of the child's life spent in parental custody, the quality of interaction between parent and child, and the child's particular needs. (*In re Amber M.* (2002) 103 Cal.App.4th 681, 689.)

Courts are divided as to the standard of review to be applied to a finding on the parental relationship exception. Most have applied a substantial evidence standard, which asks whether there is any substantial evidence, contradicted or otherwise, supporting the juvenile court's finding. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827; *In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53; *In re Autumn H.* (1994) 27 Cal.App.4th

567, 575.) Others have reviewed the finding for an abuse of discretion. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)

Under either standard, the juvenile court's finding is proper. Despite the warmth of their relationship, father had only a single visit with A.A. during his one-year incarceration. The first prong of parental benefit exception was not satisfied because father did not maintain regular visitation and contact with her. (§ 366.26, subd. (c)(1)(B)(i).) Substantial evidence supports the juvenile court's finding that the parental relationship exception did not apply.

DISPOSITION

The judgment (orders denying modification and terminating parental rights) is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Ginger E. Garrett, Judge
Superior Court County of San Luis Obispo

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